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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 17938 1127

JOHN C. BURKE, Warden,
Wisconsin State Prison,
Petitioner,

v.

FRANK ROBERT CORDEE HAHN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 17939

JOHN C. BURKE, Warden,
Wisconsin State Prison,
Petitioner,

v.

FRANK ROBERT CORDEE HAHN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, John C. Burke, hereinafter called the "warden," respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 19, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 430 Fed. 2d 100. The opinion of the District Court for the Western District of Wisconsin is at R. 312-318 and so far as it deals with the issue involved here is printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1970 and the time to move for rehearing was enlarged for cause (illness of counsel). Thereafter a motion for rehearing in banc was made within the enlarged time, and was denied September 29, 1970. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 2101 (c).

QUESTION PRESENTED

Whether a person placed on probation by a state court is entitled under the Fourteenth Amendment due process clause to a hearing on whether grounds exist for revocation thereof.

The Court of Appeals held in the affirmative.

STATUTES INVOLVED

Wisconsin Statutes 1967, 57.01 (1), 57.02 and 57.03 (1)

57.01 Probation of felons. (1) When a person is convicted of a felony (convictions under s. 52.05 excepted) and it appears to the court from his character and the circumstances of the case that he is not likely again to commit crime and that the public welfare does not require that he shall suffer the penalty of the law, the court may, by order, withhold sentence or impose sentence and stay its execution and in either case place him on probation to the department for a stated period, stating in the order the reasons therefor, and may impose as a condition of such order or of continuing it in effect that he shall make restitution or pay the costs of prosecution or do both. The period of probation may be made consecutive to a sentence of imprisonment on a different charge, whether imposed at the same time or previously. Consecutive periods of probation may be imposed. In case the conditions of probation are violated, the current probation and all subsequent consecutive probations shall be revoked.

57.02 Control of probationer. Except as provided otherwise in section 57.025, every probationer in the custody of the department shall be subject to the control of the department under regulations applicable to paroled persons. Upon the entry of the order of probation the court or the clerk of the court shall deliver a certified copy of the record in the case to the department, whereupon the custody of the probationer vests in the department.

57.03 Return to court; discharge. (1) If a probationer in its charge violates the conditions of his probation, *the department* may order him brought before the court for sentence which shall then be imposed without further stay or *if already sentenced may order him to prison;* and

the term of sentence shall begin on the date he enters the prison. *A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison.*

STATEMENT OF THE CASE

This is a habeas corpus case on the petition of a then inmate of the Wisconsin state prison, hereinafter called "petitioner," alleging inter alia that his probation was revoked "in violation of due process and equal protection clauses of both State and Federal Constitutions" (R. 14). A brief of then counsel for petitioner originally filed in coram nobis proceedings in the circuit court of Clark county, Wisconsin and annexed to the petition conceded that the department of public welfare had authority by statute to revoke probation but claimed that under *Escoe v. Zerbst,* (1935) 295 U.S. 490 and *Mempa v. Rhay,* (1967) 389 U.S. 128, the revocation must be reviewed by the sentencing court (R. 49-50.[1]

The response, par. 4, denied "that petitioner was denied due process of law or equal protection of the laws in connection with the revocation of his probation" (R. 130).

Petitioner was convicted of burglary and jail escape on September 12, 1964 and sentenced to not more than 5 years in the state prisons and 6 months in the county jail concurrently, execution was stayed, and he was placed on 5 years probation in custody of the state department of public welfare pursuant to secs. 57.01 and 57.04, Wis. Stats. (R. 12, 22, 128-129).

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1. The question of probation revocation was not properly involved in the coram nobis proceedings. *Hansen v. State,* (1967) 33 Wis. 2d 648, 148 N.W. 4, is only the latest of many Wisconsin cases holding that "the writ encompasses only errors of fact outside the record which are unknown to the trial court and which if known would have *prevented the entry of judgment*" (emphasis supplied). See also 11 *Wis. L. Rev.* 248 (1936) and 1966 *Wis. L. Rev.* at 496.

It had been administratively decided that if he received probation he would be permitted to go to his mother's home in Illinois for supervision under the uniform act for out-of-state parolee supervision, sec. 57.13 Wis. Stats.,[2] commonly known as the "parole compact" (but including probation cases as well), and the judge noted his approval of this although it was not within his jurisdiction to do so (R. 166). The *Probation Agreement* setting out the conditions of probation is not a part of this record, nor is the *Agreement to Return* (*Handbook of Interstate Crime Control* [Rev. ed. 1966] p. 16) which is required of all probationers and parolees going to another state for supervision under the compact. There was never a hearing in the habeas corpus proceedings in which the warden could have offered those documents in evidence.

An Illinois parole officer, according to petitioner, declined to accept petitioner for supervision and ordered him to return to Wisconsin (R. 139, 215-216). About November 19, 1964, petitioner absconded, whereupon the department pursuant to its authority under sec. 57.03, Wis. Stats., revoked his probation and ordered him to prison to serve his sentence (R. 132). Many months later, in September, 1965, he was captured in Wisconsin and taken to prison, where he was received September 13, 1965 (R. 129, 167).

In October, 1967, petitioner filed a petition for a writ of error coram nobis in the trial court (R. 167). The petition does not seem to have stated any legal grounds for the writ[3] but the court set it for hearing, which was held January 8, 1968 (R. 133, 170) and on February 8, 1968, the trial judge filed the decision of the court denying the petition (R. 133-156).

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2. See *United States v. Lohman*, (7th Cir. 1955), 228 F. 2d 824.

3. See footnote 1, *supra*.

Petitioner in the coram nobis proceedings took the ridiculous position that his probation was "contingent upon my * * * staying out of the State of Wisconsin for a period of five years" and that his revocation was "due to the fact I refused to return to the State of Wisconsin, because the court at that time had ordered me out of the State of Wisconsin" (R. 210). The court pursued the matter with him, showing that the court had done no such thing (R. 210-213, 218-220) and in its opinion it rejected his contention that he absconded to California "because the court had ordered him to stay out of the State of Wisconsin"[4] (R. 153-154).

In ruling on his state habeas corpus petition, the Wisconsin Supreme Court on June 28, 1968 affirmed all the findings and conclusions of the circuit court (R. 168). The Seventh Circuit Court of Appeals, however, revived his discredited contention and stated as a fact that petitioner "interpreted his probation as being contingent on staying out of Wisconsin, he believed he could not return to Wisconsin * * *." 430 F. 2d 100, at 103.

The opinion of the United States District Court for the Western District of Wisconsin, Hon. James F. Doyle, District Judge (R. 312-318) disposed of many issues. There had been no hearing in the federal court.[5]

On the issue of whether probation was conditioned that he remain outside Wisconsin the district court commented that

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4. If Wisconsin law had provided a hearing before the trial court on revocation of probation, it would have been before the court and judge who made this finding rejecting his contention.

5. Neither in the coram nobis proceedings nor in the state and federal habeas corpus cases has the department had an opportunity to establish the facts of this case or to explain its system of administering probation and parole, which is considered by many superior to most court administered systems prevailing elsewhere. Indeed, Milwaukee county, Wisconsin, has proposed to the legislature that its court-administered probation system be taken over and incorporated into the state system. 1967 Assembly Bill No. 910. The proposal is expected to be revived next year.

it "is not supported by the evidence presented at the coram nobis hearing" (R. 317).

Construing the claim of denial of due process and equal protection as meaning that "he was not returned to the trial court for a hearing before being confined in the Wisconsin State Prison" the district court held that "generally, there is no constitutional right to a hearing on the revocation of probation" nor "to the assistance of counsel at a revocation of probation proceeding," citing cases (R. 317).

The Court of Appeals reversed on the sole point of lack of a hearing on revocation of probation, on August 19, 1970. Motion for a rehearing and for a hearing in banc was denied September 29, 1970.

REASONS FOR GRANTING CERTIORARI

I. The Decision Below is in Conflict with the Ruling Decision of this Court.

The decision below (430 F. 2d at 105) notes and quotes from *Escoe v. Zerbst,* (1935) 295 U.S. 490, 492-3, in which this Court held that a federal probationer's right to a revocation hearing was based on statute, not on the Constitution. This Court said:

> "In thus holding *we do not accept* the petitioner's contention *that the privilege has a basis in the Constitution,* apart from any statute. *Probation* or suspension of sentence *comes as an act of grace* to one convicted of a crime, *and may be coupled with such conditions in respect of its duration as Congress may impose.* Burns v. United States, 287 U. S. 216, 77 L. ed. 266, 53 S. Ct. 154. But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided to the courts." (Emphasis supplied)

Call it dictum if you will--it was a deliberate statement of law made by this Court in answer to an argument advanced by a party. It has not been repudiated by this Court and *it was relied on by the Wisconsin legislature* when it repealed the former requirement (Wis. Stats. 1945, sec. 57.03 (1)) of a "personal hearing" in case of revocation of probation by the department (Wis. Laws 1947, ch. 477, sec. 5[6]).

Indeed, this Court seems to have avoided any conflict with *Escoe* when in *Mempa v. Rhay,* (1967) 389 U.S. 128, 136-137 it held the right to counsel to apply to the imposition of the *deferred sentence,* avoiding any suggestion that it applied to the revocation proceeding as such. This was emphasized in the later case of *McConnell v. Rhay* (1968) 393 U.S. 2, 4:

> "***The right to counsel *at sentencing* must therefore be treated like the right to counsel at other stages of adjudication." (Emphasis supplied.)

If *Escoe* is indeed eroded by the decisions relied on below relating to the dissimilar fields of unemployment compensation, public employment and public assistance, the word should come from this Court. It is submitted *Escoe* is still good law.

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6. An interim committee serving between the 1945 and 1947 sessions determined that hearings were unnecessary and provided for their abolition in its revision bill.

II. There is a Conflict Among the Courts of Appeal on the Point.

In holding that there is no right to a hearing upon revocation of a state parole,[7] the Court of Appeals for the 6th Circuit stated regarding revocation of probation in *Rose v. Haskins*, (6th Cir. 1968) 388 F. 2d 91, 95:

> "The Supreme Court of the United States has held that the privilege of a probationer is not a right guaranteed by the Constitution, but 'comes as an act of grace to one convicted of a crime and may be coupled with such conditions in respect of its duration as Congress may impose.' In the absence of statutory provision, the probationer is not entitled to a hearing on revocation. Escoe v. Zerbst, 295 U.S. 490, 492, 493, 55 S.Ct. 818, 819, 79 L.Ed. 1566 (1935); Burns v. United States, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932). See also State ex rel. Harris v. Ragen, 177 F.2d 303 (7th Cir. 1949)."

In accord with the decision below is *Hewett v. North Carolina* (4th Cir. 1970) 415 F. 2d 1316, 1322.

III. The Probationer was Foreclosed by the Statutory Provision for Revocation Without Hearing.

It is well established by both this Court and the Supreme Court of Wisconsin that courts have no inherent power to grant indefinite stays of execution of criminal sentences, and hence the power to place convicted defendants on probation is dependent upon legislation.

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7. While parole is distinguishable from probation (*Eason v. Dickson*, 9th Cir. 1968) 390 F. 2d 585, 588, note 3), it is nevertheless a closely related field. In Wisconsin (outside Milwaukee County) the two have from the beginning been administered by the same agency (in adult felony cases) under substantially similar laws and procedures. See Wis. Laws 1907, Ch. 110; Wis. Laws 1909, Ch. 541; Wis. Stats. 1967 secs. 57.01, 57.02, 57.03, 57.06.

Ex parte United States, (1916) 242 U.S. 27;

Drewniak v. State ex rel. Jacquest, (1942) 237 Wis. 475, 1 N.W. 2d 899.

The Wisconsin legislature has provided for a system of probation of adult felons in which administration and revocation (outside Milwaukee county) are under a state administrative agency staffed by career professionals, and has specifically *and deliberately* withheld any right to hearing on revocation.[8] That is the only form of probation which was available to petitioner. He had its benefits, freely accepted, and cannot be heard to question its burdens in the form of revocation without hearing for absconding from supervision.

Anno., 65 A.L.R. 2d 662;
16 Am. Jur. 2d 331–Const. L. § 135;

Booth Fisheries Co. v. Industrial Comm., (1926) 271 U.S. 208, 211, 46 S. Ct. 491, 70 L. ed. 908;

Pierce Oil Corp. v. Phoenix Ref. Co., (1922) 259 U.S. 125, 128-9, 66 L. ed. 855, 42 S. Ct. 440;

St. Louis Malleable Casting Co. v. George C. Prendergast Const. Co., (1923) 260 U.S. 469, 472, 67 L. ed. 351, 354, 43 S. Ct. 178;

Wall v. Parrot Silver & Copper Co., (1917) 244 U.S. 407, 412, 37 S. Ct. 609, 61 L. ed. 1229;

Buck v. Kuykendall, (1925) 267 U.S. 307, 316, 45 S. Ct. 324, 69 L. ed. 623, 38 A.L.R. 286.

IV. The Rule Announced Below is Undesirable.

The Court of Appeals envisions revocation of probation as a contest between hostile parties which must be determined

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8. See note 6, *supra.*

by a neutral umpire upon evidence produced in court or quasi-judicial proceedings. This notion of an adversary proceeding is most unrealistic and puts the probation agent and indeed the entire agency in a false position. Moreover, what pressures there are are against revocation, since institutional custody is much more expensive. Taking a family off of A.F.D.C. saves public funds. Revocation of probation costs tax money.

The agent and the agency are not the opponents of the probationer–they are his dedicated allies striving for his good and hoping that he will "make it." They are not policemen engaged in "the often competitive business of law enforcement." Every revocation represents a failure, and ordinarily is a last resort. Even so serious a breach as absconding may sometimes be forgiven and probation (or parole) status restored after having been revoked.[9]

Contact between the agent (who is constantly in touch also with his supervisor) and the "client" is generally pretty constant unless the "client" is engaged in a course of conduct inconsistent with his obligations, and before revocation (except in the case of absconders) there is almost always at least one interview about it. So the notion that a formal hearing is necessary to give a probationer "a reasonable opportunity to explain away the accusation" (430 F. 2d at 104) is completely mistaken. (The absconder can "explain" later.)

The agent, of course, has access to all the knowledge that the department has in its files about the "client"–prior probation, parole or imprisonment contacts, psychiatric appraisals, presentence investigations, information currently or previously obtained from the spouse, friends, relatives, employers,

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9. The department's authority to reinstate probation or parole after revocation is recognized by sec. 57.072 Wis. Stats. We do not mean to disparage the department's obligation to protect society, of course.

all of which enter into the decision to revoke and much of which cannot for one reason or another be satisfactorily produced at a hearing, if at all.

Much of what was said about pre-sentence investigation reports in *Williams v. New York,* (1949) 337 U.S. 241, 249-250 is appropos here:

> "Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. * * * To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent impositions of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination.***

On the other hand, some causes of revocation are so obvious that a hearing to prove them is a pure waste of time–conviction or admission of another serious crime, absconding. Even then revocation may not follow although it could be justified at hearing.

If the court of appeals envisioned an administrative hearing, it was requiring a more or less expensive proceeding to make what is bound to be an imperfect record of what the department already knows. Moreover, some information should never be dragged into the open because to do so will, if successful, dry up sources or imperil family or other relationships with the client.

On the other hand, if the court of appeals meant a judicial hearing,[10] then it is loading onto the overburdened court system a duty to hear matters in which they have little or no professional expertise and decide them on, as noted, necessarily imperfect records or on records which are so open-and-shut as not to justify the not inconsiderable expense and waste of judicial (and administrative) manpower. That this system prevails federally and in most other states does nor recommend it as superior to the administrative system of Wisconsin.

Moreover, the probationer may be supervised at a location hundreds of miles from the court (or even in a distant state), making necessary the production of the probationer, his agent and possibly witnesses at a great distance from the scene of the violations, or the taking of depositions in the other state.

The department has been revoking probations, we are informed, at the rate of around 50 per month. Assuming that administrative hearings are to be utilized (which is presently in litigation) hearing examiners and stenographic reporters (both very scarce) must be found and hired. Travel expense, time of agents taken away from their regular duties--all the familiar delays, frustrations and expense attendant upon litigation--confront us, and at a time when expenses of state government are reaching unprecedented levels and all state service is exhorted to cut expenses. And for what? So we can have a vastly inferior probation system to that which we have had historically, about which no complaint has been made on grounds of fairness, except by such "con men" as Hahn--who didn't get away with it until the Court of Appeals.

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10. This is hinted in the last sentence of the opinion. But (outside Milwaukee County) Wisconsin courts lack authority to revoke probation or even to review administrative revocations.

It seems clear that the *Hahn* rule, if it stands, will itself cut down the number of revocations for the reason that the trial courts will not grant probation as freely as they have, in doubtful cases. So, at least, one trial judge has told the writer. But this will increase the number of institutional inmates, and deprive some convicts of "one last chance" on probation. And institutional custody is more expensive, the institutions are crowded, etc.

It is therefore respectfully submitted that certiorari should be granted.

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ORDER OF DISTRICT COURT DENYING HABEAS CORPUS

APPEAL DOCUMENT NO. 13

This is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 in which petitioner, presently incarcerated at the Wisconsin State Prison, contends that he is confined in violation of rights secured to him by the Constitution of the United States. Leave was granted to file the petition *in forma pauperis*. Respondents were ordered to respond to certain allegations in the petition and a response has been filed. (R. 312).

* * *

The grounds on which petitioner bases his contention that he is unlawfully confined are: * * * (6) that petitioner's probation was revoked without affording him due process or equal protection; * * * . (R. 313).

* * *

Petitioner's sixth allegation is that his probation was revoked without affording him due process or equal protection. With respect to this allegation petitioner appears to make two contentions: (1) that due process and equal protection were denied because he was not returned to the trial court for a hearing before being confined in the Wisconsin State Prison; and (2) that a condition of his probation was that he remain outside Wisconsin, but that his probation was revoked for not returning to Wisconsin when requested. (R. 316).

With respect to the contention that petitioner was denied due process and equal protection because he was not returned to the trial court for a hearing before his probation was revoked, generally there is no constitutional right to a hearing

on the revocation of probation. See *Escoe v. Zerbst,* 295 U.S. 490, 55 S. Ct. 818, 79 L. Ed. 1566 (1935); *Eason v. Dickson,* 390 F. 2d 585 (9th Cir.) cert. denied 392 U.S. 914 (1968); *Rose v. Haskins,* 388 F. 2d 91 (6th Cir.) cert. denied 392 U.S. 946 (1968); *Richardson v. Markley,* 339 F. 2d 967 (7th Cir. 1965). Nor is there a constitutional right to the assistance of counsel at a revocation of probation proceeding. *Williams v. Patterson,* 389 F. 2d 374 (10th Cir. 1968); *United States v. Brierly,* 288 F. Supp. 401 (E.D. Pa. 1968); *Sammons v. United States,* 285 F. Supp. 100 (S.D. Tex. 1968); *United States v. Hartsell,* 277 F. Supp. 993 (E.D. Tenn. 1967); cf. *Sorenson v. Young,* 282 F. Supp. 1009 (D. Minn. 1968).

These general rules are not applicable when the hearing on revocation of probation involves a deferred sentencing procedure. *Mempa v. Rhay,* 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 226 (1967). The petitioner in *Mempa v. Rhay, supra,* had been placed on probation without sentence having been imposed. The court imposed sentence at the probation revocation hearing. Under these circumstances, the probation revocation hearing was held to be a critical stage in the proceedings at which the petitioner was entitled to the assistance of counsel.

In the present case, sentence had been imposed prior to placing petitioner on probation. The rationale of *Mempa v. Rhay, supra,* is, therefore, not applicable here.

The contention that a condition of petitioner's probation was that he remain outside Wisconsin is not supported by the evidence presented at the coram nobis hearing. With respect to petitioner's sixth allegation, the petition for a writ of habeas corpus must be denied. (R. 317).

* * *

For the reasons set forth above, the petition for a writ of habeas corpus is hereby denied.

Entered this 16th day of July, 1969.

By the Court:

/s/ James E. Doyle
District Judge

(R. 318).

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 17938
FRANK ROBERT CORDEE HAHN,
Petitioner-Appellant,
v.
JOHN C. BURKE, Warden, Wisconsin State Prison,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.

August 19, 1970

Before CLARK, *Associate Justice, Retired,** and CUMMINGS and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This is an appeal from the district court's denial of a petition, pursuant to 28 U.S.C. §2254 attacking petitioner's Wisconsin incarceration. Petitioner Frank Hahn pled guilty to a charge of burglary on September 12, 1964, and was sentenced to five years in the state prison for the burglary charge and an additional offense of trying to escape from the County Jail. The execution of petitioner's sentence was stayed, however, and he was placed on probation for a five-year period. Petitioner's probation was revoked without a hearing on December 4, 1964, on the basis that he had violated its terms by absconding to California, and upon his return

* The Honorable Tom C. Clark, Associate Justice, United States Supreme Court, Retired, is sitting by special designation.

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to Wisconsin in September of 1965, petitioner was confined to the Wisconsin State prison.

In January of 1968, petitioner filed a petition for a writ of error coram nobis in the Circuit Court for Clark County. An evidentiary hearing was held and the coram nobis writ was denied in February of 1968. Petitioner thereafter filed with the Wisconsin Supreme Court a petition for a writ of error to review the order of the Circuit Court denying the petition for a writ of error coram nobis. The Wisconsin Supreme Court treated the petition as one for a writ of habeas corpus and ordered a response. Upon the filing of the response, the Wisconsin Supreme Court affirmed the findings and conclusions of the Circuit Court and denied the petition for a writ of habeas corpus.

In May of 1968, pursuant to an extradition agreement between the Governors of Wisconsin and Illinois, petitioner Hahn was returned to Illinois to stand trial on several indictments for burglary. Petitioner, however, was never tried on these burglary indictments, but instead, was tried and sentenced to 5-10 years for escaping from the Champaign County Jail while awaiting trial on the burglary charges. Subsequently, Hahn was returned to Wisconsin State Prison and on December 2, 1969, received a mandatory conditional release from the Wisconsin State Prison and was placed on a one-year probation.[1]

On appeal petitioner raises the following contentions:

(1) that his sixth amendment right to representation by counsel was violated by (a) the failure of the trial court to appoint counsel to assist petitioner in his coram nobis petition, and (b) the failure of the Wisconsin Supreme Court to appoint counsel to assist petitioner in his preparation of a writ of habeas corpus to the Wisconsin Supreme Court;

(2) that the State of Wisconsin, by surrendering petitioner Hahn to the authorities of the State of Illinois while he was serving his five-year sentence in the Wis-

[1] Petitioner then returned to serve his Illinois sentence, escaped from the Illinois jail, stole a car, and was indicted, convicted and received a five-year sentence for the interstate transportation of a stolen car. 18 U.S.C. §2312. Petitioner Hahn is presently incarcerated in the federal penitentiary at Terre Haute serving this sentence.

consin State Prison, waived jurisdiction over petitioner and had no power to incarcerate petitioner upon his return from Illinois;

(3) that petitioner's constitutional rights to due process and equal protection were violated by the revocation of petitioner's probation without a hearing.

Before reaching the merits of petitioner's contentions, we must dispose of issues of jurisdiction and mootness. Since petitioner filed his habeas corpus petition while he was still incarcerated pursuant to his Wisconsin sentence, the "in custody" requirement of 28 U.S.C. §2254 is satisfied. *See Carafas* v. *LaVallee*, 391 U.S. 234 (1968). Petitioner's probationer status would also seem to satisfy the "in custody" requirement. *Cf. Jones* v. *Cunningham*, 371 U.S. 236 (1963).

As to mootness, although petitioner is not presently serving his challenged Wisconsin sentence, this appeal is not moot. The probation revocation affixes a permanent blemish to petitioner's record. If petitioner ever has future difficulties with the law in Wisconsin, the judge could take into account the fact that petitioner's probationary status was at one time revoked. Moreover, in this instance, petitioner may be entitled to his outright Wisconsin release as of September, 1969, as a result of the invalid revocation of probation and attendant lack of credit given him on his five-year sentence of September, 1964. Therefore, there are collateral consequences in allowing petitioner's Wisconsin burglary conviction and parole revocation to remain on his record. *See Sibron* v. *New York*, 392 U.S. 40, 56 (1968); *see also Hewett* v. *State of North Carolina*, 415 F. 2d 1316, 1322 (4th Cir. 1970).

The record indicates that petitioner was represented by counsel in his coram nobis proceeding. Petitioner's counsel submitted a brief, conducted an evidentiary hearing and appeared on final argument. Consequently, we find petitioner's first contention of error to be without merit.

As to the allegation that the failure of the Wisconsin Supreme Court to appoint counsel on petitioner's state habeas corpus petition was error and the allegation that

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Wisconsin lost jurisdiction over petitioner by reason of his extradition to Illinois, we agree with the district court that both allegations should be dismissed for failure to exhaust available state remedies. 28 U.S.C. §2254(b).

Petitioner's final contention is that the failure to provide a hearing upon revocation of his probation violated his constitutional rights.[2] The conditions of petitioner's probation were not clear. It appears that petitioner was to return to Illinois, where his mother lived, and practice his trade of barbering. Illinois, however, would not accept petitioner as a probationer, and petitioner claims that because he interpreted his probation as being contingent on staying out of Wisconsin, he believed he could not return to Wisconsin and left for California. The State Department of Public Welfare, without a hearing or without giving petitioner any opportunity to be heard, revoked his probation.

We hold the revocation of petitioner's probation was violative of the basic requirements of due process. While we are mindful that probation is a privilege and not a right and is subject to the conditions of the court, *see Escoe* v. *Zerbst*, 295 U.S. 490 (1935), essential procedural due process no longer turns on the distinction between a privilege and a right. *See Goldberg* v. *Kelly*, 38 U.S.L.W. 4223, 4225 (May 23, 1970); *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6 (1969); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956). *See also* Von Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1967-8).

The United States Supreme Court in a recent decision holding that welfare recipients were entitled to a hearing before termination of public assistance payments stated:

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[2] Petitioner's probation was revoked pursuant to Wisc. Ann. Stat. §57.03 which provides in pertinent part:

(1) If a probationer in its charge violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed without further stay or if already sentenced, may order him to prison; and the term of sentence shall begin on the date he enters the prison. A copy of the order of the department shall be sufficient authority for the office executing it to take the petitioner to court or to prison.

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss" Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. *Goldberg* v. *Kelly*, *supra*, at 4225.

Recognizing the fact that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing, *see e.g. Ewing* v. *Mytinger & Casselberry Inc.*, 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (seizure of food not fit for human use); *Yakus* v. *United States*, 321 U.S. 414 (1944) (adoption of wartime price regulations); *Gonzales* v. *Freeman*, 334 F. 2d 570 (D.C. Cir. 1964) (disqualification of a contractor to do business with the government), the Court in *Goldberg* distinguishes these cases from the situation of a welfare recipient:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing and medical care [citation and footnote omitted]. Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else where government largess is ended—is that termination of aid pending resolution of a controversy may deprive an eligible recipient of the very means to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate.

The immediacy of desperation is at the very least equally as strong in the case of a probationer who is literally being denied his freedom. Weighing the "extent to which he [the petitioner] may be 'condemned to grievous loss'" against "the governmental interest in summary adjudication" we find the petitioner's loss of freedom to outweigh the added state burden of providing a limited

hearing to allow petitioner to be confronted with his probation violation and to be heard.[3]

The state need not grant probation, but if it does so, it should not be able to arbitrarily revoke such probation without giving petitioner a reasonable opportunity to explain away the accusation that he had violated the conditions upon which his probation was granted.[4] *See Fleanor* v. *Hammond*, 116 F. 2d 982 (6th Cir. 1941); *see also* ALI Model Penal Code §301.4 (1962); ABA Sentencing Alternatives and Procedures §5.5(c); Study Draft of a New Federal Criminal Code, published June 8, 1970, by the National Commission on Reform of Federal Criminal Laws, §3104(2) at 277-78; 1 Davis *Administrative Law Treatise* §716, pp. 174-81 (1965 Supp.). When the state created conditions of probation it impliedly agreed to continue petitioner's probation as long as the conditions were satisfied. To allow the state to summarily revoke the petitioner's probation without a hearing to determine if the conditions upon which the probation was granted have been violated, is state action inconsistent with the due process guarantees of the fourteenth amendment.

In addition to the right—privilege dichotomy, some courts have based their denial of a hearing on the theory that probation is a form of contract. Consequently, if one condition of the probation contract is the possibility of summary revocation, the probationer or parolee cannot complain if that action is taken. We find this theory unpersuasive. Probation is in fact not a contract. The probationer does not enter into the agreement on an equal status with the state. As Judge Celebrezze stated in his excellent dissenting opinion in *Rose* v. *Haskins*, 388 F. 2d at 100, finding that due process required a hearing in the case of a parole revocation:

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[3] It has been argued that requiring a hearing in the case of a probation revocation would create a prohibitive cost on the system. *But see* Warren, *Probation in the Federal System of Criminal Justice*, 20 Fed. Prob. 3 (1955), where it is indicated that the cost of maintaining a prisoner is ten times the cost of maintaining a parolee or probationer. The small added expense of a hearing would not overtax the state probation program.

[4] One may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law. *Homer* v. *Richmond*, 292 F. 2d 719, 722 (D.C.Cir. 1961).

> [I]f the negative pregnant that is implicit in the contract theory is true (that if the parolee had not agreed to summary revocation he would have had the right to hearing), then that theory has recognized that a right to a hearing is inherent in the revocation situation. Waiver of such a valuable right is not to be lightly determined, and when the "choice" of the parolee is to remain in prison or accept such a burdensome provision, the "choice" to accept parole can hardly be termed a voluntary waiver of a hearing.

We agree.

We are cognizant of the Supreme Court's opinion in *Escoe* v. *Zerbst*, 295 U.S. 490 (1935), holding that there is no constitutional right to a hearing in the case of probation revocation.

> In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. 295 U.S. at 492-93.

Cf. Eason v. *Dickson*, 390 F. 2d 585 (9th Cir. 1968), *cert. denied* 392 U.S. 914 (1968); *Rose* v. *Haskins*, 388 F. 2d 91 (6th Cir. 1968); and *Richardson* v. *Markley*, 339 F. 2d 967, 970 (7th Cir. 1965); (all three cases state by way of dicta that there is no constitutional right to a probation revocation hearing, and hold that there is no constitutional right to a hearing in the case of parole revocation)[5] (but see Celebrezze, J. dissenting in *Rose* v. *Haskins*, 388 F. 2d at 97).[5a]

The Court in *Escoe*, however, did in fact grant petitioner a hearing pursuant to a Congressional statute. We interpret the dicta in *Escoe* to indicate only that the Court's opinion was not based on a constitutional right to a hearing and not as a binding precedented rejection of such a

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[5] Since we are not faced with the question of the constitutional right to a hearing pursuant to a parole revocation, we need not decide this issue.

[5a] This opinion has been circulated to the full active court. No judge has requested a hearing *en banc*.

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constitutional right. Our interpretation of the *Escoe* dicta coupled with the fact that the basis of the dicta—privilege-right distinction—has all but been obliterated by recent Supreme Court opinions, see page 4 *supra*, moves us to hold that fundamental constitutional requirements of due process necessitate a limited hearing prior to a probation revocation.[6]

> No society is free when the government makes one person's liberty depend upon the arbitrary will of another. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 217 (1953). Black, J.. dissenting.

We wish to thank Mr. George M. St. Peter for his service as court appointed counsel for the petitioner-appellant.

For the foregoing reasons, we hold petitioner's probation revocation to be a nullity and therefore reverse and remand to the district court with directions to expunge the revocation from petitioner's record. The Wisconsin court may, however, hold a probation revocation hearing at this time if it has jurisdiction over probationer.

REVERSED AND REMANDED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

[6] This is not to deny that probationers could not be detained where circumstances required and a hearing was not immediately possible. We need not now explore the specific procedural characteristics which revocation must have.